Supreme Court, U.S.
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No. 99-363

In The

Supreme Court of the United States

MARTHA ROBI,

Petitioner,

v.

HERBERT REED, JOHN VILLANO, J.P. PRODUCTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. CHRISTOPHER DONNELLY
Counsel of Record
DONNELLY, CONROY & GELHAAR, LLP
One Post Office Square
Boston, MA 02109-2105
(617) 542-7400
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Petitioner has accurately identified Martha Robi ("Robi") as petitioner and Herb Reed ("Reed") and John Villano ("Villano") as respondents. The third respondent identified by petitioner, "J.P. Productions" is not a juridical entity. In the lower courts and herein, the third respondent (defendant and counterclaim plaintiff) was and is John P. Productions, Inc. ("JPPI"), a corporation that has no parent companies or subsidiaries.

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CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner has presented the text of the Supremacy Clause and Commerce Clause, but nowhere argues that the Ninth Circuit decision conflicts with or even implicates those provisions.

The pertinent text of the California partnership statute, Cal. Corp. Code §§ 15029, 15038 and § 15043, is set forth at page 20 below.

STATEMENT OF THE CASE

The petition for a writ of certiorari filed by Robi – who has been represented by counsel throughout, but now purports to appear "in pro se"[1] – concedes by its

[1] In the district court and court of appeals Robi has been and still is represented by Allen Hyman. On July 14, 1999, in support of Robi's motion in the Ninth Circuit to stay issuance of the mandate, Attorney Hyman declared under penalty of perjury: "Our office has completed a draft of the Petition for a Writ of Certiorari to the United States Supreme Court for Martha Robi." He further reported that Robi had "associated the law firm of Pepper & Corazzini [in Washington, DC] to consult and assist with the preparation of [the petition]" and that firm was undertaking a review of and providing their input into the initial draft. On August 11, 1999, in support of a further stay of the mandate, Attorney Hyman said Robi's petition was complete but "Allen Hyman, counsel for Appellant Robi, has been required to be away from his offices on unanticipated mandatory legal matters, and has been unable to proofread, finalize, and duplicate the Petition for a Writ of Certiorari to the United States Supreme Court for filing and service." On August 26, 1999, Attorney Hyman, as counsel to Robi, notified the Ninth Circuit that the petition for a writ of certiorari had been filed.

silence the absence of any reasons identified in Rule 10(a) for granting the writ. The ruling does not conflict with a decision of another United States court of appeals, it does not involve an important federal question that conflicts with a decision by a state court of last resort, and there is no call for this Court to exercise its supervisory powers. At most, Robi is claiming the circuit court misapplied settled rules of law concerning issue preclusion and partnership. There is no basis for granting Robi's petition and, as shown below, the lower court's decision was correct.

Robi's statement of the case (Pet., at 3-15) is replete with misstatements and, in addition, relies extensively on matters that were not properly before the district court or the court of appeals and, thus, cannot be considered by this Court. As detailed below, items F, K, L, M, N, O, Q, R, U, BB and CC in Robi's Appendix ("App.") were not part of the summary judgment record and, therefore, are not properly before this Court. In light of the admonition in Sup. Ct. R. 15.2 regarding possible waiver of misstatements not identified in opposition to a petition for a writ of certiorari, respondents present the following accurate statement of the case:

On September 7, 1999, Attorney Hyman forwarded to respondents the notice required by Sup. Ct. Rule 12.3. Obviously, Robi is not without counsel and, therefore, should not receive any of the indulgences sometimes accorded *pro se* litigants. *See O'Reilly v. New York Times Co.*, 692 F.2d 863, 868 (2d Cir. 1982); *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971); *Johnson v. Bd. Of County Com'rs*, 868 F.Supp. 1226, 1231 (D. Colo. 1994), *aff'd*, 85 F.3d 489 (10th Cir. 1996).

Nature of the Case

This case is a contest between Reed and Robi for exclusive rights to perform under the service mark "The Platters". Reed is a musical performer who, in 1953, named and founded The Platters singing group and first performed under "The Platters" mark. Reed used the mark extensively in public performances and, by early 1954, had further used and commercialized the mark to the point of recording songs. Reed is the only original member of The Platters who is still providing musical entertainment services. Robi, who did not enter the United States until 1958, has *never* personally performed using the mark "The Platters." She had nothing to do with Herb Reed's origination and use of the mark, and she did not use the mark in any respect until 1988. She claims exclusive rights to "The Platters" service mark through her status as widow of Paul Robi, who joined The Platters approximately a year after Reed formed and named the group, who left the group in 1965 after his arrest and who died in 1989.

Course of Proceedings

The pleadings

In late 1995, Robi filed suit against Reed, Villano, JPPI and others.[2] Claiming to have exclusive rights to the mark "The Platters", Robi proceeded on theories of

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[2] Robi never served defendant The Five Platters, Inc. ("FPI"), and she settled with the three other defendants (Tony Cee Associates, Cuzin Richard Entertainment Associates, and United Concert Productions Corp.).

declaratory relief, unfair competition under 15 U.S.C. § 1125(a) and a Nevada statute, slander of title and interference with economic relations. (CR 1[3]). Reed, Villano and JPPI denied Robi's allegations and filed a six count counterclaim against her. (CR 69). Reed alleged that he has exclusive rights to "The Platters" mark and, accordingly, Robi is liable to him, Villano and JPPI for violations of 15 U.S.C. § 1125(a), interference with contractual and prospective relations, fraudulent application for and receipt of state service mark registrations, and unfair competition, deceptive trade practices and false advertising in violation of Nevada statutes and the common law.

The summary judgment proceedings

In April 1996, the district court denied Martha Robi's motion for a temporary restraining order (CR 37) and in August 1996 it denied Robi's preliminary injunction motion, concluding in a seven page order that "plaintiff has not demonstrated a likelihood of success on the merits." (CR 83).

On September 17, 1996, Reed and the other respondents moved for summary judgment. (CR 87). They expressly relied on the affidavit of Reed and exhibits thereto (App. Y (partial); *see* CR 56). On October 4, 1996, Robi filed her opposition to the summary judgment motion (CR 97). Robi elected not to submit any opposing affidavits, instead relying exclusively on legal arguments. She cited no cases other than *Robi v. Five Platters, Inc.*, 838

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[3] "CR" refers to the district court clerk's record, i.e., the number from the docket sheet.

F.2d 318 (9th Cir. 1988) and 918 F.2d 1439 (9th Cir. 1990). In addition, in her counter-statement of facts that she contended were in dispute, Robi attempted to dispute only four facts asserted in Reed's summary judgment motion. (CR 98A). Thus, she effectively conceded all other facts in Reed's summary judgment motion.[4]

Later, weeks after the deadline for opposing the motion had passed, Robi filed additional papers, purportedly in further opposition to appellees' summary judgment motion. Reed opposed the supplemental filings. (CR 123). Well within its discretion, the district court denied Robi leave to file her out-of-time supplemental papers. (CR 140).

Along with their motion for summary judgment, Reed, Villano and JPPI filed on September 17, 1996 a motion for protective order, seeking a stay of all discovery pending decision on summary judgment. (CR 86). Robi opposed the protective order motion (CR 90) and moved to continue her summary judgment opposition in order to obtain discovery (CR 91). The magistrate judge to whom all discovery matters had been referred pursuant to 28 U.S.C. § 636(b)(1)(A) granted Reed's protective order motion and denied Robi's motion for discovery. (CR 101). Robi subsequently filed with the

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[4] Local Rule 56.1 of the Nevada district court provided: "Motions for summary judgment *and responses thereto shall* include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence on which the party relies." (Emphasis added).

district judge objections to the discovery rulings, pursuant to 28 U.S.C. § 636(b)(1)(A). (CR 107). The district court denied Robi's objections. (CR 140).

While the summary judgment motion was under advisement, on February 24, 1997, Robi requested the district court to take judicial notice of FPI's bankruptcy filing. (CR 137). Reed, Villano and JPPI opposed. (CR 138). The district court denied Robi's request. (CR 140).

By Order dated September 29, 1997 (App. C; CR 140), the district court granted summary judgment. It ruled that (1) all original members of a musical group who created its goodwill have collective ownership of the service mark rights in the group's name, (2) such members do not take such rights with them when they leave the group and (3) the last remaining original member who carries on the group continues ownership of the service mark rights. The court concluded that "[s]ince Reed was the original member who remained with The Platters as the others left, it is Reed who now owns the exclusive right to the mark The Platters." The court also ruled that even if Paul Robi had retained some individual right to "The Platters" mark when he left in 1965, that right would have been personal to him and therefore could not be assigned to Martha Robi and ceased upon his death in 1989. In accordance with 15 U.S.C. § 1116(a) and well-settled case law, e.g., *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988), the district court entered a judgment permanently enjoining Robi, her agents, servants, employees, attorneys, and persons in active concert or participation from using in any manner the mark "The Platters" alone or in conjunction with any other names or words. (CR 141). The court also

ordered cancellation of Robi's state registrations, destruction of all goods bearing "The Platters" mark, and an assessment of damages. (*Id.*).

On October 1, 1997, Robi filed a notice of appeal. (CR 142).

Robi's post-judgment motions

Although none of Robi's post-judgment motions were properly before the court of appeals for review, Robi has attempted to supplement the summary judgment record by relying on post-judgment materials in her brief to this Court. Thus, the following summary is provided, but without waiver of Reed's contention that the court of appeals lacked and this Court lacks jurisdiction over the post-judgment matters.

On October 8, 1997, the district court denied Robi's motion for a temporary stay of the injunction against her use of "The Platters" mark, ordered her not to book any future engagements, and stayed only the destruction and cancellation of state registrations portions of the injunction. (CR 148).

On October 14, 1997, Robi moved pursuant to Fed. R. Civ. P. 59(e) to vacate, alter or amend the judgment and order, (CR 154). The district court denied the motion, reiterating its ruling that Robi's reliance on prior decisions adverse to FPI to show Paul Robi's right precludes her from avoiding those same rulings when it comes to Reed. (Tr. 10/27/97, pp. 28-32).

Later, Robi requested the district court to take judicial notice of certain documents from a case between

Reed and FPI in the Southern District of Florida. (CR 162). Although Reed had identified that case at the outset of the present action (in December 1995) (CR 8B), Robi made no effort to present the Florida papers until *after* judgment was entered by the district court. Well within its discretion, the district court denied the request for judicial review. (Tr. 10/27/97, pp. 32-33). Robi did not appeal from that denial.

The court of appeals rulings

In December 1997, Robi filed with the court of appeals various motions to stay, for an injunction and for expedited briefing and a request for judicial notice. By Order dated January 26, 1998, the Ninth Circuit denied the motions and granted the request for judicial notice. (App. B).

On April 2, 1999, the Ninth Circuit affirmed the district court's permanent injunction, holding that Reed "retains the right to use of the service mark ['The Platters'] to the exclusion of Robi." *Robi v. Reed*, 173 F.3d 736, 740 (9th Cir. 1999); App. A, 8a.

Ongoing proceedings in the lower courts

In the district court, Robi objected to production of damages documents and information, requiring Reed, Villano and JPPI to file a motion to compel, which the district court granted. After Robi's non-compliance, in June 1999 the district court found Robi in contempt. A hearing to assess damages is scheduled for October 4, 1999.

Under advisement in the court of appeals is Reed's application for attorney's fees pursuant to 15 U.S.C. § 1117(a) and Nevada Revised Statutes 598A.210. Also pending is the Ninth Circuit's order directing Robi's counsel to show cause why he should not be responsible for a portion of Reed's appellate counsel fees, pursuant to 28 U.S.C. § 1927, for unreasonably and vexatiously multiplying those proceedings.

Statement of Facts

Set forth below are the essential facts that were properly before the district court when it ruled on summary judgment. Many of the factual assertions included in Robi's petition appeared in affidavits and exhibits that were filed late, in violation of court rule. The district court properly refused consideration of those pleadings. (CR 140). Robi did not challenge that ruling in the court of appeals. The alleged facts that are based on those stricken materials (CR 109-120) cannot be considered by this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58, n.16 (1970); *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989). Other factual assertions were presented only in Robi's post-judgment papers (CR 154, 157, 158, 159, 162, 164, 165, 169) and, again, are not properly before this Court. *Adickes*, 398 U.S. at n.16; *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1527 & n.3 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993). Still others are drawn from testimony and exhibits presented by Robi at the preliminary injunction hearing. Because that testimony and all but a few of the exhibits were not referenced in Robi's

summary judgment opposition, those materials and the factual assertions founded on those materials are also not properly before this Court on review of the district court's summary judgment grant. *Id.*; *Harkins*, 850 F.2d at 482; *National Industries, Inc. v. Republic Nat. Life Ins. Co.*, 677 F.2d 1258, 1270 (9th Cir. 1982).

In sum, the only materials Robi properly placed before the district court in opposition to summary judgment are an opposition brief that cited only two cases (CR 97), a statement challenging only four of Reed's undisputed facts (CR 98A), and five exhibits referenced in Robi's opposition (only two of which are included in Robi's Appendix – App. G&P).

Since Reed organized and named the musical group "The Platters" in 1953, he has earned his living by singing and performing under that name. (HR Aff.,[5] ¶¶ 5-92; DX 1-65). When Reed formed the group in 1953, The Platters were himself, Joe Jefferson, Alex Hodge and Cornell Gunther. In 1954, Jefferson and Gunther ceased performing with Reed, and David Lynch and Tony Williams began performing with Reed and Hodge as The Platters. After they recorded several songs together as The Platters, Zola Taylor joined them as part of the ensemble. (HR Aff., ¶¶ 5-19; DX 1-5).

Paul Robi began performing with Reed as a member of The Platters in August or September 1954, when he

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[5] "HR. Aff." refers to the Affidavit of Herb Reed, sworn to May 7, 1996, submitted in support of Reed's summary judgment motion. "DX" refers to Defendants' Exhibits attached thereto. A portion of Reed's affidavit, without the exhibits, appears at App Y.

replaced Hodge. Around 1957, Martha Robi (then using a different surname) and Paul Robi met one another. (HR Aff. ¶¶ 18-22).

Martha Robi, who is not a musical entertainer, *never* performed with The Platters. (*Id.* ¶ 23). Her use of the mark began in 1988, as a promoter and producer, around the time of Paul Robi's death and 35 years after Herb Reed's first use. (Tr. 5/14/96 (afternoon session), at 54).[6]

Reed is the only original member of The Platters who is still personally performing musical entertainment. (HR Aff., ¶ 21). Gunther, Hodge, Lynch, Williams, and Paul Robi are all deceased. (*Id.* ¶¶ 11, 20).

In the 1950s, Buck Ram became the manager of The Platters, and wrongfully induced Reed, Williams, Lynch, Taylor and Paul Robi to purportedly assign to a supposed corporation called The Five Platters, Inc. ("FPI") all of their rights to the mark "The Platters." (*Id.* ¶¶ 43-44). Those assignments were subsequently deemed ineffective. *See Robi*, 918 F.2d at n.2, in which the Ninth Circuit affirmed the trial court's adoption of findings that FPI "was a sham used by Ram to obtain 'The Platters' name"; that "the FPI stock was issued to the group members illegally"; and that "the members received nothing for their interest in 'The Platters' name".

In 1965, Paul Robi was arrested for possession of illegal narcotics; the charges resulted in a felony conviction. (HR Aff. ¶ 36; DX 19). He severed his relationship with Reed, and he ceased any musical performances with

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[6] Robi's testimony at the preliminary injunction hearing was referenced in Reed's summary judgment motion (CR 87).

Reed and The Platters group which had comprised Reed, Paul Robi, Williams, Lynch and Taylor. (*Id.*). Thereafter, without authority from Reed, Paul Robi performed with others under various names, including "Paul Robi's Platters", "The World Famous Platters", and "Paul Robi's World Famous Platters". (*Id.*).

In 1969, Reed discontinued his relationship with Ram and Ram's sham corporation, FPI. Reed continued performing under "The Platters" mark and, later, under that mark joined with his name. Reed has continuously provided musical entertainment using the mark "The Platters" and "Herb Reed and The Platters." None of those performances have been under the authority of FPI. (HR Aff. ¶¶ 45-46; DX 25).

After Reed disassociated himself from Ram and FPI, that sham corporation sought to prevent Paul Robi from using the mark "The Platters." A California state court ultimately determined that FPI had no right to stop Paul Robi from using "The Platters" mark, as the purported "assignments" from the performers were fraudulently obtained by FPI and, therefore, invalid. (App. G). A federal district court in California reached the same conclusion. *Robi*, 918 F.2d at 1441. While on appeal, Paul Robi died and Martha Robi was substituted by agreement as a party. *Robi*, 918 F.2d at n.1. At the time of the substitution, however, no court adjudicated or even considered whether Paul Robi's personal service rights, if any, in "The Platters" mark could be assigned to a non-performer or anyone else. The Ninth Circuit ultimately affirmed the money judgment against FPI and affirmed cancellation of all "The Platters" marks held by FPI. *Robi*, 918 F.2d at 1441. The Ninth Circuit did not, however, rule

that *Martha Robi* had any performance rights (or any other rights) to "The Platters" mark.

Earlier, in 1987, FPI and Reed had settled a suit in the Southern District of Florida by agreement under which Reed retained the right to perform as "Herb Reed and The Platters" and conditionally agreed not to use the name "The Platters" by itself unless FPI were found to have no rights in the name. (HR Aff., ¶ 62).[7] That condition in fact occurred when the California federal court confirmed that FPI was a sham and canceled its marks – a decision affirmed by the Ninth Circuit. *Robi*, 918 F.2d at 1441.[8]

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[7] The settlement agreement itself (App. K) was not in the record at the time of the district court's ruling. Only after entry of judgment did Robi seek to present that document (CR 162). The district court properly declined consideration of the document, denying Robi's judicial notice request. Robi never appealed that denial. Therefore, the document is not part of the record that should be considered in assessing the lower court's injunction ruling. *E.g.*, *Adickes*, 398 U.S. at n.16; *Columbia Pictures*, 944 F.2d at 1527, n.3; *Harkins*, 850 F.2d at 482.

[8] The April 1, 1975 "Agreement" on which Robi now attempts to rely (App. Q) is not signed by all the purported parties and, in any event, expires by its own terms when litigation commenced – which in fact occurred in Florida federal court. The document also provides that Reed was not waiving or prejudicing his ownership of "The Platters" name. In addition, Robi did not bring the document to the district court's attention until after judgment was entered against her. (CR 162). The district court refused to take judicial notice of it. Thus, the document is among those with which Robi improperly attempted to supplement the record, and the document may not be considered. *Adickes*, 398 U.S. at n.16; *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994); *Columbia Pictures*, 944 F.2d at 1527, n.3.

Since Paul Robi's death in 1989, Robi has waged an unlawful campaign to misappropriate Reed's mark "The Platters" and to dilute the economic value of that mark to Reed. Without authorization from Reed, Robi has promoted, produced and sold performances of singers she bills as "The Platters." These counterfeit groups do not include any former members of the original group The Platters. Robi has operated as many as three of these groups simultaneously around the country. (HR Aff. ¶ 93).

In furtherance of her unlawful scheme, Robi and her agents have falsely informed customers and potential customers of Reed that he has no right to use the name "The Platters" or "Herb Reed and The Platters", and that she has the rights to the mark "The Platters." (DX 67-68; HR Aff. ¶ 96). Robi has falsely asserted to Reed's customers and potential customers that she has a federal registration for "The Platters" mark. (*Id.*). In addition, she fraudulently obtained several state registrations. Robi's actions have severely damaged Reed, reducing the number of his performances and the prices he can charge. (HR Aff. ¶ 97).

Robi also filed two applications in the United States Patent and Trademark Office ("PTO") seeking registration of the mark "The Platters," falsely declaring in both that she was the owner of the mark and that no other person has the right to use the mark. (DX 66; HR Aff. ¶¶ 94-95). Robi also falsely claimed that she first used the mark in 1956 (later changed to 1953-1954), before she had even met Paul Robi. (*Id.*). Robi ultimately abandoned her first application, and her second application is the subject of a pending PTO opposition proceeding commenced by

Reed. (*Id.*). (The PTO has stayed the opposition proceedings pending resolution of this case.)

None of the above facts concerning Robi's false statements to the PTO, to Reed's potential customers and to the consuming public were refuted by Robi in her summary judgment opposition. (CR 97, 98A).

Reed was never a party to any of the litigation between Paul Robi and FPI, and prior to the Nevada district court's ruling no court had ever adjudicated Paul Robi's rights vis-a-vis Reed to the mark "The Platters." From the time Paul Robi left The Platters in 1965 until his death in 1989, he never claimed that Reed was barred from using "The Platters" mark or that Reed had cheated him as a partner.

ARGUMENT – REASONS FOR DENYING THE WRIT

I. THE DECISION DOES NOT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT OR STATE COURT OF LAST RESORT

Robi's petition does not satisfy any of the criteria (guiding but not wholly controlling) set forth in Sup. Ct. R. 10(a). Robi does not contend the Ninth Circuit decision conflicts with the decision of another circuit court or conflicts with the decision by a state court of last resort concerning an important federal question.

Although far from clear, insofar as Robi may be claiming the Ninth Circuit decision conflicts with other decisions of the *same* circuit court, discretionary review by this Court is not appropriate. *See, e.g., Davis v. United*

States, 417 U.S. 333, 340 (1974). Notably, the Ninth Circuit denied Robi's petition for rehearing en banc.

II. THE PRECLUSION ISSUE NOW RAISED IN QUESTION 1 WAS NOT RAISED IN ROBI'S OPENING BRIEF IN THE COURT OF APPEALS AND RELIES ON MATTERS NOT BEFORE THE LOWER COURT

In her first "question presented", Robi contends the court of appeals misapplied claim and issue preclusion principles in failing to give effect to a conditional 1987 settlement agreement between Reed and FPI. Robi never raised this issue in her opening brief in the court of appeals. Robi's failure to raise the issue is confirmed by the fact that her opening brief never cited *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Brown v. Felsen*, 442 U.S. 127 (1979); or *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the three Supreme Court cases on which she relies in her petition. Not surprisingly, the Ninth Circuit decision did not undertake any lengthy preclusion analysis, merely ruling *sub silentio* that Robi was bound by the findings favorable to Paul Robi (petitioner's assignor) made in a 1974 lawsuit with FPI and in subsequent federal cases, *see Robi v. Five Platters, Inc.*, 838 F.2d 318 (9th Cir. 1988) and 918 F.2d 1439 (9th Cir.1990) – including the fact that the purported assignments by Reed, Paul Robi and other performers were ineffective.

It is well settled that this Court will not grant certiorari or otherwise consider issues that were not pressed before or considered by the court of appeals. *Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998); *United States v.*

Williams, 504 U.S. 36, 41-44 (1992); *Adickes*, 398 U.S. at 147 n.2.

An additional reason for not considering petitioner's first question is its central reliance on a document not before the district court on summary judgment and not properly before the court of appeals. Robi did not submit the 1987 Florida settlement document in opposition to Reed's summary judgment motion. Instead, Robi first attempted to get it before the district court after entry of the permanent injunction judgment. The district judge denied Robi's request to take judicial notice of the document, a decision that Robi did not appeal. Thus, the document certainly cannot be considered by this Court. *Adickes*, 398 U.S. at n.16.

In any case, the 1987 settlement document does nothing for Robi's case. Reed retained the right to use "The Platters" mark with his own name and, further, the right to use "The Platters" alone if FPI were found to have no rights in the name – a condition which in fact occurred. *See* page 13, *supra*. Thus, the lower court decisions in this case were entirely consistent with the 1987 conditional settlement.

III. THE COURT OF APPEALS DID NOT ESTABLISH A "FEDERAL PARTNERSHIP LAW" AND ITS DECISION WAS IN ANY EVENT CORRECT UNDER CALIFORNIA LAW

The heart of the Ninth Circuit's ruling is its conclusion that "The Platters" mark was owned collectively by the musical group's original five performers, and that Reed – "the one who founded and named the group and

as the person who has maintained continuity with the group and has been in a position to control the quality of its services" – retained the right to use the mark because the others left the group or passed away. The ruling follows general partnership principles enunciated by this Court more than 100 years ago and is correct under the California partnership statute, even assuming *arguendo* it is applicable.[9]

First, it is well established that a departing partner does not take with him a right to use the partnership's name or mark. *Menendez v. Holt*, 128 U.S. 514 (1888). There, a partnership sold flour under the mark "La Favorita." One of the partners, Ryder, resigned and began selling flour under the same mark. This Court affirmed an injunction prohibiting Ryder from using the mark. It expressly rejected the former partner's contention that he should be allowed "his share" in the goodwill by using the mark. *Id.* at 522. So long as the partnership remains in business, it retains ownership of the mark. *Id.* While not a music group case, Robi has offered no reason why the rationale and holding of *Menendez* should not be applied here.

The cases cited by the court of appeals and district court are all in accord. *Kingsmen v. K-Tel Int'l, Ltd*, 557

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[9] Reed has argued, and still contends, that he is entitled to exclusive rights as the undisputed first user of "The Platters" mark. *Columbia Mill Co. v. Alcorn*, 150 U.S. 460, 463-64 (1893); *Sengoku Works Ltd. v. RMC Intern., Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997); *LaSociete Anonyme Des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1271 (2d Cir. 1974). The court of appeals did not reach Reed's contention.

F.Supp. 178 (S.D.N.Y. 1983); *HEC Enterprises, Ltd. v. Deep Purple, Inc.*, 213 U.S.P.Q. 991 (C.D. Cal. 1980); *Albertini v. Giglio*, (E.D.Pa. 1979) (unpublished; discussed in *The Four Aces Litigation: What's In A Name?*, 5 Art & The Law 67 (1980)); *Giammarese v. Delfino*, 197 U.S.P.Q. 162 (N.D.Ill. 1977); *Boogie Kings v. Guillory*, 188 So.2d 445 (La. App. 3 Cir. 1966). Robi's efforts to distinguish those cases are unavailing. Robi has failed to offer any argument or law suggesting how Paul Robi (never mind Martha, who has never performed) could have usurped the group's ownership of the mark when he left the group due to a narcotics arrest. Notably, Robi has not cited a single pertinent case in her petition in support of her claim that the lower court erred.[10]

Second, when the partnership dissolved on Robi's arrest and departure in 1965, California partnership law may have provided for a distribution of partnership property. (None of the partners, however, requested such a distribution. *See* discussion of partnership law, *infra*). In view of the principle that service mark law normally requires an exclusive award to a single user, *Bell v. Streetwise Records, Ltd.*, 761 F.2d 67, 76 (1st Cir. 1985) (Breyer and Coffin, concurring), an award to all five partners would not have been appropriate. *See In re Marriage of Shelton*, 118 Cal. App. 3d 811, 173 Cal. Rptr. 629, 630-31 (3d Dist. 1981), in which the court ruled that a mark

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[10] Robi's likening Reed to someone assisting Serbian soldiers in their purge of Albanian Kosovars (Pet., at n.8) is not only wide of the mark, but grossly offensive and scandalous, warranting sanctions against Robi and her ghost writing counsel. *See* note 1, *supra*.

owned jointly by a married couple doing business together should be awarded in divorce to only one spouse. Principles of equity would have compelled such an award be made to Reed, the person who brought the name to the partnership and originated the group.

Third, an alternative analysis of rights under the California partnership statute – which Robi contends is applicable – also results in an award of exclusive rights to Reed. Under the statute, Paul Robi's departure from The Platters group in 1965 because of his arrest operated as a "dissolution" of the partnership, defined as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Cal. Corp. Code § 15029. As that dissolution was caused wrongfully by Paul Robi, and the business continued on, then Paul Robi (not Martha) had a claim against his co-partners "to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash . . . but in ascertaining the value of the partner's business the good-will of the business shall not be considered." *Id.* § 15038(2)(c)(II). Any such claim by Paul Robi accrued "at the date of dissolution", i.e., in 1965. *Id.* § 15043. Paul Robi never brought any claim against Reed or his other co-partners, and by now any such claim would be time-barred. None of Reed's other partners brought any claim against him after they left the partnership. Thus, as the last partner, Reed owns "The Platters" mark.

IV. THE COURT OF APPEALS DECISION, PLAINLY HOLDING THAT REED HAS THE RIGHT TO EXCLUDE ROBI'S USE OF THE MARK, IS NOT INTERNALLY INCONSISTENT

The Ninth Circuit decision is not "anomalous", as Robi contends. (Pet., at 25). It is entirely clear and internally consistent. The Ninth Circuit correctly recognized:

> [O]ur previous decisions did not address Paul Robi's rights to use the name "The Platters" as compared to Herb Reed's, nor did they address Martha Robi's rights to use that name as compared to Herb Reed's. Rather, they addressed FPI's rights to prevent Paul Robi from using the name "The Platters."

App. A, 4a; 173 F.3d at 738. The court then held "the district court was correct in ruling that Reed had a right to use of the name to the exclusion of [Martha] Robi." App. A, 8a; 173 F.3d at 740. The court's statement in footnote 1 is addressed not to Reed personally – who the court ruled has the right to use "The Platters" mark – but to other members of his present group.

In any event, there is no reason for this Court to review a footnote in this decision or any other court of appeals decision.

CONCLUSION

Reed, Villano and JPPI respectfully request the court to deny Robi's petition for writ of certiorari.

Respectfully submitted,

T. Christopher Donnelly
Counsel of Record
Donnelly, Conroy & Gelhaar, LLP
One Post Office Square
Suite 3350
Boston, MA 02109-2105
Tel. (617) 542-7400

Counsel for Respondents